

## DEPARTMENT OF STATE REVENUE

Revenue Ruling #2018-01URT  
October 11, 2019

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## ISSUES

## I. Gross Retail Tax - Imposition

Authority: [IC 6-2.5-4-5](#); [IC 6-2.5-5-3](#); [IC 6-2.5-5-5.1](#); [IC 6-2.5-5-10](#); [45 IAC 2.2-4-11](#); [45 IAC 2.2-5-8](#); Sales Tax Information Bulletin #51 (July 2007).

A Taxpayer (Company) is seeking an opinion as to the following issues:

1. Whether Company is considered a utility under the Indiana sales and use tax law.
2. Whether Company's purchased goods utilized in the construction of an energy production plant qualify for production plant or power production expenses exemption for public utilities of electricity or steam.
3. Whether the power generated by the plant would be subject to Indiana sales tax when sold.

## II. Utility Receipts Tax - Imposition

Authority: [IC 6-2.3-1-4](#); [IC 6-2.3-1-12](#); [IC 6-2.3-1-14](#); [IC 6-2.3-2-1](#); [IC 6-2.3-3-5](#).

Company is seeking an opinion as to whether Company would be subject to the utility receipts tax (URT).

## III. Utility Services Use Tax - Imposition

Authority: [IC 6-2.3-5.5-4](#); [IC 6-2.3-5.5-6](#).

Company is seeking an opinion as to whether Company would be subject to the utility services use tax (USUT).

## STATEMENT OF FACTS

Company is the wholly owned subsidiary of a global energy company. Company provides the following information regarding its request, reproduced exactly as submitted in its request for a ruling with certain details redacted:

[Company's] core business is the design and construction of hi-tech production lines for industry. It is a leading developer of sustainable, emission reducing, high efficient energy management solutions.

[Company] has executed a contract with an Indiana manufacturer to fabricate and operate a cogeneration plant. The plant will produce energy (steam and compressed air) and be exclusively utilized by the manufacturer as part of their production process. The plant will be constructed on the manufacturer's location and be connected to the existing production plant. [Company] will operate the plant and sell the resulting energy to its customer.

[Company] has acquired several licenses/permits from the state related to this project including: (1) application for construction design release (IDHS Indiana Development of Homeland security), (2) redevelopment council application (Hammond municipality), (3) air permit application through Indiana Department of Environmental Management (IDEM), (4) electrical connection (NIPSCO), and gas connection (Nipsco).

## DISCUSSION

## I. Gross Retail Tax

Regarding the first issue, [IC 6-2.5-4-5\(b\)](#) provides that a public utility (or a power subsidiary of a public utility<sup>1</sup>) is a retail merchant making a retail transaction when the person furnishes or sells electrical energy, natural or artificial gas, water, steam or steam heating to a person for commercial or domestic consumption. In this case, Company is furnishing air and steam to its customer for commercial consumption, but the question is whether Company would be considered a public utility. Company posits that it is, and points to the Department's regulations at [45 IAC 2.2-4-11](#), which clarifies what is meant by a "public utility," providing in relevant part the following:

(d) The term "public utilities" as used in this regulation [[45 IAC 2.2](#)] means any organization which is engaged in the furnishing or selling of . . . steam . . . and having the right of eminent domain or subject to government regulation in connection with the furnishing of public utility services. The term includes governmental units and not-for-profit organizations which furnish public utility services.

Company affirms that it does not have the right to eminent domain or at least has not been required to attempt to acquire such a right based upon the agreement with its counterparty, but Company maintains that the IDEM air permit application should be considered subjecting Company to governmental regulation. However, per [45 IAC 2.2-4-11\(d\)](#), the government regulation must be "in connection with the furnishing of public utility services." This is further explained in the Department's publication Sales Tax Information Bulletin #51 (July 2007):

The act of registering to be regulated by governmental units is not the activity which creates a public utility. It is the performance of that act which should be regulated by a governmental unit, that creates the responsibility of a public utility to collect and remit taxes.

The air permit issued by IDEM appears to pertain to the regulation of air pollutants relating to the construction of new major stationary sources of air pollution, but does not evince a government regulation that is in connection with the furnishing of public utility services. Therefore, unless some other governmental unit actually regulates Company in a way that is connected with the furnishing of public utility services, Company cannot be considered a public utility for purposes of [IC 6-2.5-4-5](#).

Regarding the second issue, Company refers to [IC 6-2.5-5-10](#), which provides the following:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

- (1) the property is classified as production plant or power production expenses, according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission; and
- (2) the person acquiring the property is:
  - (A) a public utility that furnishes or sells electrical energy, steam, or steam heat in a retail transaction described in [IC 6-2.5-4-5](#); or
  - (B) a power subsidiary (as defined in [IC 6-2.5-4-5\(a\)](#)) that furnishes or sells electrical energy, steam, or steam heat to a public utility described in clause (A).

Company maintains that because they are a public utility pursuant to [IC 6-2.5-4-5](#), they should qualify for this exemption with respect to specific purchased components, such as vertical receivers, pressurized deaerators, a chemical tank, and a selective catalytic reduction (SCR) system. However, as Company is **not** a public utility, they would not qualify for this exemption.

However, some of Company's purchases may qualify under the manufacturing and production exemption found at [IC 6-2.5-5-3](#). Pursuant to this statute, manufacturing machinery, tools, and equipment are exempt if the person acquiring the machinery, tools, and equipment acquires it for direct use in the direct manufacturing or production of other tangible personal property for sale. More context on the exemption at [IC 6-2.5-5-3](#) is provided by the Department's regulations. [45 IAC 2.2-5-8\(c\)](#) provides that machinery, tools, and equipment qualify for the exemption only if they have an "immediate effect" on the article produced. Machinery, tools and equipment have an immediate effect on the article being produced if they are "an essential and integral part of an integrated process which produces tangible personal property." [45 IAC 2.2-5-8\(c\)](#).

Company states that the purchased components listed above are vital to the operation of the compressed air system, the steam generation process, or the engine driver generation system. Regarding the vertical receivers, Company explains that they are buffer vessels that store compressed air. They are in synthesis storage components included in the compressed air system. There are apparently two, with the same capacity in volume: the first one stores wet compressed air, while the second one stores compressed air after the process of drying.

The pressurized deaerators remove oxygen before the water is fed into the steam generators. The steam

generation in the boilers are part of the production plant as a whole. The water, before entering the boilers, has to be pre-heated and the oxygen content removed. These functions are realized into a pressurized vessel, which is the deaerator.

The chemical tank stores deoxygenant chemicals which are dosed in the deaerator. They are within the steam production plant and are part of the same process as the deaerators. The specific chemicals which stored within these tanks support the process of oxygen removal.

The SCR system reduces the nitrogen oxide content into the exhaust flow from the engine generator. It is part of the core engine component of the power production plant. It is located along the exhaust stream, and it's a catalytic system used to reduce the level of nitrogen oxide.

However, while all of these items might be important to the production process, Company does not explain how any of these pieces of equipment or machinery are directly used in the direct production of steam for sale to its customer. Without further information, the Department cannot conclude that these pieces of equipment or machinery are or are not exempt under [IC 6-2.5-5-3](#).

Turning to the third issue, Company again points to [IC 6-2.5-4-5](#), which provides in relevant part in subsection (c) that a public utility or a power subsidiary of a public utility is not a retail merchant making a retail transaction when:

(3) The power subsidiary or person sells the services or commodities listed in subsection (b) to a person for use in manufacturing, mining, production, processing (after December 31, 2012), repairing (after December 31, 2012), refining, recycling (as defined in [IC 6-2.5-5-45.8](#)), oil extraction, mineral extraction, irrigation, agriculture, floriculture (after December 31, 2012), arboriculture (after December 31, 2012), or horticulture. However, this exclusion for sales of the services and commodities only applies if the services are consumed as an essential and integral part of an integrated process that produces tangible personal property and those sales are separately metered for the excepted uses listed in this subdivision, or if those sales are not separately metered but are predominately used by the purchaser for the excepted uses listed in this subdivision.

The purpose of this subsection is to exclude certain utility sales from being retail transactions which are therefore not subject to sales or use tax. This is different than a statutory exemption to an otherwise taxable retail transaction, as the underlying transaction is never subject to sales or use tax as opposed to transactions that are by default subject to tax except in the case where an exemption applies.

However, as discussed previously, Company is not a public utility, so no part of [IC 6-2.5-4-5](#) is applicable. Instead, even though [IC 6-2.5-4-5](#) does not apply to Company, the sale of the energy to the Indiana manufacturer customer would still be considered a taxable retail transaction under [IC 6-2.5-4-1](#). With that being said, Company's customer may be eligible for an exemption under [IC 6-2.5-5-5.1](#) if the customer uses the energy at least in part in an exempt manner by consuming the energy in its manufacturing process. [IC 6-2.5-5-5.1](#) provides the following in relevant part:

- (a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas, water, steam, and steam heat.
- (b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing . . .

Normally, this statute must be read in conjunction with [IC 6-2.5-4-5\(c\)\(3\)](#), which to reiterate provides as follows:

(c) [A] power subsidiary or a person engaged as a public utility is not a retail merchant making a retail transaction in any of the following transactions:

...

(3) The power subsidiary or person sells the services or commodities listed in subsection (b) to a person for use in manufacturing, mining, production, processing (after December 31, 2012), repairing (after December 31, 2012), refining, recycling (as defined in [IC 6-2.5-5-45.8](#)), oil extraction, mineral extraction, irrigation, agriculture, floriculture (after December 31, 2012), arboriculture (after December 31, 2012), or horticulture. However, this exclusion for sales of the services and commodities only applies if the services are consumed as an essential and integral part of an integrated process that produces tangible personal property and those sales are separately metered for the excepted uses listed in this subdivision, or if those

sales are not separately metered but are predominately used by the purchaser for the excepted uses listed in this subdivision.

In this context, a customer must first file a Utility Sales Tax Exemption Application (Form ST-200) with the Department. The form would be reviewed by the Department and, if the meter qualifies for the exemption, a validated Form ST-109 will be sent to the customer to be forwarded to the public utility or power subsidiary, at which point the public utility or power subsidiary can sell electricity exempt to a customer. However, because Company is not a public utility, Company's customer cannot purchase the utilities exempt from sales tax using this process. Instead, because the customer has a direct pay permit and some of their utilities purchased will be exempt under [IC 6-2.5-5.1](#), the customer may purchase the utilities exempt from Company and the customer may then determine what tax is owed to the department.

## II. Utility Receipts Tax

The imposition of the URT is found in [IC 6-2.3-2-1](#), which provides:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

"Gross receipts" are defined by [IC 6-2.3-1-4](#) to mean "anything of value, including cash or other tangible or intangible property, that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services." [IC 6-2.3-1-14](#) defines "utility service" to include the furnishing of electrical energy and steam. Further, "taxpayer" is defined by [IC 6-2.3-1-12](#) to include any of the following terms:

- (1) assignee;
- (2) receiver;
- (3) commissioner;
- (4) fiduciary;
- (5) trustee;
- (6) institution;
- (7) consignee;
- (8) firm;
- (9) partnership;
- (10) limited liability partnership;
- (11) joint venture;
- (12) pool;
- (13) syndicate;
- (14) bureau;
- (15) association;
- (16) cooperative association;
- (17) corporation;
- (18) political subdivision (as defined in [IC 36-1-2-13](#)) or the state of Indiana, to the extent engaged in private or proprietary activities or business;
- (19) trust;
- (20) limited liability company; or
- (21) other group or combination acting as a unit;

regardless of whether the entity is exempt for state adjusted gross income tax purposes under [IC 6-3](#) or for federal income tax purposes under the Internal Revenue Code. This term is broad enough to include both Company's utility provider and Company.

Company maintains that they are not subject to the URT because the sales should not be considered retail sales pursuant to [IC 6-2.5-4-5\(c\)](#), but it has been established that [IC 6-2.5-4-5](#) does not apply to Company. However, [IC 6-2.3-3-5\(a\)](#) provides that gross receipts do not include a wholesale sale to another generator or reseller of utility services. Subsection (c) goes on to provide that a sale of utility services is a wholesale sale if the utility services are natural gas and the buyer consumes the natural gas in the direct production of electricity to be sold by the buyer. This would apply in part to Company's utility provider, which is selling natural gas to Company and Company is using that natural gas to generate electricity to sell to its customer.

On the other hand, Company is also generating steam for sale to its customer, and steam is a specifically listed

"utility service" in [IC 6-2.3-1-14](#). Therefore, Company's utility provider can remove the gross receipts on the portion of natural gas that is being used by Company to generate electricity, but the gross receipts on the portion that will be used for any other purpose would still be subject to URT to the utility provider. As for Company, they would then be responsible for paying URT on the gross receipts from the sale of electricity to its customer for purposes of [IC 6-2.3-2-1](#); however, the receipts from the sales of steam (or air) are not subject to URT.

### III. Utility Services Use Tax

The utility services use tax ("USUT") is an excise tax imposed upon the retail consumption of utility services in Indiana. [IC 6-2.3-5.5-1](#). Pursuant to [IC 6-2.3-5.5-6](#), it is the consumer of the utility service that is personally liable for the USUT.

[IC 6-2.3-5.5-4](#) provides that the consumption of utility services is exempt from the USUT under the following circumstances:

- (1) [The] transaction is subject to utility receipts tax (including a public utility (as defined in [IC 8-1-2-1](#)) and the utility receipts tax is paid on the gross receipts from the utility services;
- (2) [The] gross receipts from the transaction are not taxable under [IC 6-2.3-3](#) and the utility services are consumed for the purposes for which the gross receipts were excluded from taxation;
- (3) [The] utility services were acquired in a transaction that is wholly or partially exempt from the utility receipts tax under [IC 6-2.3-4](#) and the utility services are consumed for the purpose for which the utility services were exempted; or
- (4) [The] utility services were acquired in a transaction that is wholly or partially subject to a deduction from the utility receipts tax under [IC 6-2.3-5-6](#) and the utility services are consumed for the purpose for which the utility services deduction was given.

Company maintains that exemption number three should apply because the utility services were sold in a transaction wholly exempt from the URT. However, because Company is in fact subject to URT on its sale of electricity to its customer as described above, this means that exemption number two would apply to the electricity purchased by Company's customer. On the other hand, Company's customer is subject to USUT on the purchase of steam from Company, as URT has not been paid on the steam and none of the other exemptions in [IC 6-2.3-5.5-4](#) apply.

### RULING

Company is not considered a public utility for purposes of [IC 6-2.5-4-5](#), as it has not established that a governmental unit actually regulates Company in a way that is connected with the furnishing of public utility services. As such, Company is not eligible for the exemption under [IC 6-2.5-5-10](#), although it may be eligible for purchases made of machinery, tools, and equipment directly used in the direct production of energy for sale to its customer under [IC 6-2.5-5-3](#). However, without further information, the Department cannot conclude whether the specific items listed are exempt pursuant to this statute.

Company's sales of energy to its customer is a retail transaction under [IC 6-2.5-4-1](#); however, customer's direct consumption of the energy in direct production of tangible personal property may be exempt. Company's receipt of their customer's direct pay permit will allow Company to sell electricity, steam, and air to its customer without charging sales tax.

Company is subject to the URT, as it is making the retail sale of utility services for consumption to its customer. However, because Company is consuming natural gas purchased from a public utility to generate electricity for sale to its customer, Company's utility provider is responsible for paying URT only on the amount of natural gas that Company purchases for purposes other than to generate electricity for sale. Company is then responsible for paying URT on the electricity it sells to its customer. Finally, Company's customer is subject to the USUT on the purchase of steam from Company.

### CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the

taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

<sup>1</sup> A power subsidiary of a public utility means a corporation which is owned or controlled by one (1) or more public utilities that furnishes or sells electrical energy, natural or artificial gas, water, steam or steam heat and which produces power exclusively for the use of those public utilities. [IC 6-2.5-4-5\(a\)](#). Company is not, nor does it maintain that it is, a power subsidiary of a public utility.

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